86-653

No.:

In The Supreme Court of the United States

October Term, 1986

RALPH R. RENNA,

Petitioner and Appellant,

vs.

CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA, PLANNING COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the City of Saratoga acted arbitrarily or capriciously resulting in a denial of due process or equal protection under the 14th Amendment in denying petitioner's request for a variance while granting similar variances to others on a lesser showing?

2. Whether the City's failure to give its reasons for denying petitioner's request for a variance resulted in denial of due process under the 14th Amendment to petitioner?

3. Whether the public hearing conducted by the City of Saratoga at 12:37 A.M., where some council persons left in the middle of the hearing, denied petitioner due process under the 14th Amendment?

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RALPH R. RENNA,

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CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA, PLANNING COMMISSION,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

RALPH R. RENNA, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Superior Court, County of Santa Clara, California, entered in the above-entitled case on March 5, 1985, affirmed by the 6th Appellate District, California Court of Appeal, after hearing on April 17, 1986; for which review by the California Supreme Court was denied on August 13, 1986.

OPINIONS BELOW

The judgment of the Superior Court, County of Santa Clara, California is printed in Appendix A hereto, infra, page App.1. The opinion of the 6th Dist. Court of Appeal is unreported and is printed in Appendix A hereto, infra, page App.19. The Order Denying Review of the Supreme Court of California is printed in Appendix A hereto, infra, page App.42.

JURISDICTION

The judgment of the Superior Court for the County of Santa Clara, California was entered March 5, 1985. A timely appeal was made and heard before the 6th Appellate Court, California Court of Appeal. The Court of Appeal affirmed the judgment after hearing on April 17, 1986. A timely petition for rehearing was made to the Court of Appeal and rehearing was denied. A timely petition for hearing was made to the California Supreme Court. On August 13, 1986, the California Supreme Court denied appellant's petition. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257(3); Rules 17(b)(c), 17(c) of the Supreme Court rules.

QUESTIONS PRESENTED

1. Whether the City of Saratoga acted arbitrarily or capriciously resulting in a denial of due process or equal

protection under the 14th Amendment in denying petitioner's request for a variance while granting similar variances to others on a lesser showing?

2. Whether the City's failure to give its reasons for denying petitioner's request for a variance resulted in denial of due process under the 14th Amendment to petitioner?

3. Whether the public hearing conducted by the City of Saratoga at 12:37 A.M., where some council persons left in the middle of the hearing, denied petitioner due process under the 14th Amendment?

STATUTE/ORDINANCE INVOLVED

California Government Code section 65906 provides:

> Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topog-

raphy, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Saratoga City Code section 17.6(a) provides in pertinent part: "The City Planning Commission may grant a variance [where it] ... makes the following findings:

1) That literal enforcement of the regulation would result in practical difficulty or physical hardship inconsistent with objectives of the zoning ordinance,

2) That there are exceptional or extraordinary circumstances or conditions to the property or its use which don't apply to other properties,

3) That literal enforcement of the regulation would deprive petitioner of privileges enjoyed by other property owners,

4) That the granting of the variance is not a special privilege,

5) That the granting of the variance is not detrimental to the public health, safety or welfare or materially injurious to properties or improvements in the vicinity.

STATEMENT OF CASE

1. Facts.

Petitioner, Ralph R. Renna, is in the process of building his home in the city of Saratoga, in an R-1 40,000 zoned district of the city of Saratoga, (minimum size of lot approx. 1 acre). (Ct. 6:8-12)[1] The City of Saratoga, its council and planning commission, will hereinafter be referred to collectively as "the City".

The home's lot has a width which is the minimum for this zone. (Ct. 51) The lot is also unique because it is at the bottom of a miniature valley (Ct.48), bordered on two sides by roadways, and vacant parcels to the north and southwest. (Ct. 49) The nearest home is the Hexem residence located 250 feet to the South of Mr. Renna's home. (Ct. 6: 27-28)

During the course of construction, prior to February of 1983, Mr. Renna added onto the sides of the home two small wrought iron balconies. (Ct. 6: 13-15; 78) The balconies could not be built on the front or rear of the home. (Ct. 20: 23-28; 78; 111) The balconies were built to provide residents of the

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[1] The following references will be used to cite to the transcripts, briefs and opinions: "Ct." = Clerk's Transcript on Appeal; "Rt" = Reporter's Transcript; "AOB = Appellant's Opening Brief; "ARB" = Appellant's Reply Brief; "PFH" = Appellant's/Petitioner's Petition for Rehearing before the California Supreme Court; "Opin." = Opinion of the 6th District Court of Appeal; pages and lines will be indicated by the page, colon, then line number.

home with a fire escape from the second story, and to improve the home aesthetically by preventing the home from appearing to be a "barn yard structure", from the side. (Ct. 6:12-15; 9:21-24; 44; 70; 78; 109-112) Five of Mr. Renna's immediate neighbors approved of the balconies, and wrote letters to the city voicing their support. (Ct.: 44; 77; 78; 154-159)

The City of Saratoga, respondents, granted various building permits and inspected the home for approximately one year after the balconies had been installed but did not complain about the balconies until Mr. Renna had appealed to the City Council for a variance for a fence he was building. (Ct. 6: 19-28, 148-149). On December 2, 1983, the City of Saratoga advised Mr. Renna that it had "become apparent" the balconies encroached upon the side yard setback of

the lot (Ct. 7: 1-4; 41-42). The north balcony encroaches only three feet and the southern balcony encroaches only four feet into the twenty foot setback (Ct.: 48). Mr. Renna applied to the City Planning Commission and the City Council for a variance to allow the balconies to intrude slightly into the setback area, but was denied. (Ct. 5-6)

The following facts were submitted or known to the City Council, and submitted upon Writ of Mandate proceeding, to the trial court, and were substantially uncontroverted. These facts include the following:

1. The balconies are necessary to provide appellants and others a means of escape in the event of fire, and were recommended by the Central Fire District of Saratoga. (Ct. 6, 9, 44, 70, 78, 109-112)

2. The sloped topography of the

land concealed the home and its balconies. (Ct. 6, 9, 48, 109-112)

3. The balconies did not invade the privacy of neighbors as the land adjacent to the north balcony was undeveloped and the nearest home to the south balcony is 250 feet from appellant's residence. (Ct. 9, 11, 109-112)

4. Similar variances have been granted to homes in the immediate vicinity. (Ct. 10, 109-112, 135-137, 139-144)

5. An identical variance for a balcony extending ten feet into the setback area was granted for a residence approximately one block from petitioner's home. The grounds for granting that variance was that petitioner's balconies provide easier access into his kitchen and outside areas. (Ct. 139-144)

6. Large numbers of property owners in the immediate area have balco-

nies on their homes. (Ct. 10; 45; 78-79; 130-133.)

7. There is no privacy impact on the part of appellant's balconies and any impact could be minimized by planting two trees. (Ct. 6, 9, 109-112, 51, 52, 54)

8. Five of petitioner's immediate adjacent neighbors wrote letters to the Planning Commission and City Council supporting the balconies. (Ct. 154-159)

9. There is no other place on the Renna house where balconies can be affixed other than the sides. (Ct. 20, 78, 109-112)

Furthermore, an adjacent neighbor planned to construct a large sport court, including tennis court and badminton courts, with high fences and foliage immediately adjacent to the Renna house lessening the privacy impact of the balconies. (Ct. 219-222)

The hearing on petitioner's variance

was held at 12:37 A.M. on a Thursday night. (Ct. 14: 1-2; 169) Councilmen dropped out of the hearing one by one. (Id.) The application was denied and Mr. Renna filed a writ of mandate with the Superior Court. (Ct. 5-6)

The Superior Court Judge stated at the hearing: "I may agree with Mr. Renna that he's being had, but that's not the issue". (Rt. 11:6-7) Petitioner submits that Mr. Renna was had by the city and denied due process by the arbitrary and capricious denial of his application for a variance.

2. Procedural History.

On January 6, 1984, Mr. Renna filed with the Saratoga Planning Commission an application for a variance to permit his balconies to remain (Ct. 7: 5-12; 44-46). On January 11, 1984 and continued on January 17, 1984, the Planning Commission held a hearing on Mr. Renna's application

for a variance, and denied his application, (Ct. 7: 19-28; 96). No findings of fact were made by the Planning Commission in denying the application, (Ct. 96).

On January 27, 1984, petitioner appealed the denial of a variance to the City Council. (Ct. 7: 2-6; 102-103) On March 8, 1984 the Saratoga City Council conducted a de novo public hearing on Mr. Renna's application for a variance, and by resolution denied the appeal and affirmed the decision of the Planning Commission. (Ct. 8: 10-17; 167)

On June 5, 1984, petitioner filed a petition for writ of mandamus seeking an alternative writ of mandamus to order the City of Saratoga not to take any action against petitioner, and to require respondents to show cause why they should not be compelled to issue a variance. (Ct. 15: 1-18) On June 6, 1985, the

Superior Court for the County of Santa Clara issued the alternative writ of mandate. (Ct. 162-163) On July 25, 1984, a hearing on the petition for writ of mandamus and alternate writ of mandate was held before the Superior Court, Santa Clara County. (Ct. 268: 21-23) The Court ordered and adjudged that the alternative writ of mandate be discharged and that the preemptory writ of mandate be denied. (Ct. 272: 25-27; 272A: 31-34)

On August 1, 1984, petitioner filed his request for a statement of decision. (Ct. 213-214) On December 21, 1984, Petitioner filed objections to defendant's proposed statement of decision. (Ct. 252-253) Also on December 21, 1984, petitioner filed a motion for reconsideration of denial of a writ of mandate, and for a hearing on objections to defendant's proposed statement of decision. (Ct. 217-218) On December 31, 1984, the

Superior Court issued an order for a hearing on the statement of decision. (Ct. 251)

On January 15, 1985 petitioner's motion for reconsideration and on the contents of the statement of decision was heard. On March 5, 1985, the Honorable Peter Stone executed the statement of decision and judgment prepared by defendants, denying the writ of mandate. (Ct. 268-272b)

Notice of appeal was filed by petitioner on January 22, 1985. (Ct. 261-262) The appeal was heard April 17, 1986. The Court of Appeal upheld the trial court's denial of writ of mandamus. Thereafter, on May 9, 1986, petitioner filed a Petition for Rehearing, which was denied on May 15, 1986.

On May 23, 1986 petitioner filed his petition for review with the Supreme Court of the State of California. On

August 13, 1986, the California Supreme Court denied petitioner's petition for review.

Petitioner raised the issue that he was discriminatorily treated and that denial of the variance was capricious and arbitrary by petition for writ of mandamus to the Superior Court. (Ct. 11: 19-23; 13: 22-28; 14: 1-6; Rt. 8: 17-18) Petitioner further raised the issue that the City of Saratoga summarily denied petitioner's application for a variance without providing for its reasons or its findings on the evidence, in his petition for writ of mandamus to the Superior Court and in his arguments. (Ct. 10: 15-16; Rt. 2: 23-26.) Finally, petitioner further raised the issue the public hearing by the city at 12:37 A.M. was discriminatory and unfair, by his petition for writ of mandamus to the Superior

Court and in his arguments. (Ct. 14: 1-2.)

The Superior Court held that "the City did not act in an arbitrary or capricious manner in denying Petitioner's request for a variance." (Ct. 271: 5-6.) The Superior Court further held the Planning Commission and the City Council had adopted the findings of the City Planning department. (Ct. 4: 16-24.) The court further held the proceedings before the Saratoga Planning Commission and Saratoga City Council were properly conducted. (Ct. 269: 32-36.)

The petitioner raised the same issues in his appeal to the Court of Appeal and in his petition for rehearing. (AOB 7-16; 19, 23, 27-30; ARB 3-7, 14-15.) The Court of Appeal held that Section 1094.5(h) of California Civil Procedure "does not include judicial inquiry as to any discriminatory motive

by the administrative body. Nor is there any evidence of improper discrimination." (Opin. p. 12.) The Court of Appeal further held the city had "adopted the staff report findings", and therefore, the "parties and the reviewing court were adequately informed of the theory upon which the Manning Commission and the City Council based its decision." (Opin. 9-10.) Finally, the Court of Appeal concluded that there was no evidence that petitioner was denied a fair hearing. (Opin. p. 12.) The Court of Appeal summarily denied petitioner's petition for rehearing.

The same issues were again raised to the Supreme Court of the State of California, by petitioner's petition for hearing. (PFH 8-14; 14-16; 16-19; 19-22.) The California Supreme Court summarily denied petitioner's petition for hearing.

REASONS FOR GRANTING WRIT

I

REVIEW BY THIS COURT IS NECESSARY TO FURTHER PRECEDENT THAT THE CITY'S DENIAL OF PETITIONER'S APPLICATION FOR A VARIANCE, WHERE THE CITY HAD GRANTED NUMEROUS SIMILAR VARIANCES AND THE EXACT SAME VARIANCE TO A NEIGHBOR WITH A LESSER SHOWING WAS ARBITRARY AND CAPRICIOUS AND DENIED PETITIONER EQUAL PROTECTION AND DUE PROCESS UNDER THE 14TH AMENDMENT.

Review by this Supreme Court is necessary to further precedent and vindicate the rights of a homeowner, so that a city government may not arbitrarily and capriciously deny a variance to one, while grant the exact same variance to another and similar variance to numerous others, on a lesser showing.

The touchstone of due process is protection of an individual against arbitrary action. Wolff v. McDonnell, 418 U.S. 539 (1974). Zoning power is not indefinite and unchallengeable and must be exercised within constitution limita-

tions. Schad v. Borough of Mount Emphraim 452 U.S. 61 (1981).

Enforcement of an otherwise valid zoning ordinance violates due process and equal protection clauses of the Fourteenth Amendment if the decision of a particular zoning agency is arbitrary or if the ordinance is applied or enforced with discriminatory intent or purpose. Scudder v. Greendale, 704 F.2d 999 (7th Cir. 1983). Similarly, this Court has held a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than neighboring ones, is not a proper exercise of police power. Penn. Central Transportation Co. v. New York City, 38 U. S. 104 (1978).

The test as to whether a zoning decision offends the 14th Amendment rights are whether the action of the zoning commission is arbitrary and capri-

cious and have no substantial relation to general welfare. Shelton v. City of College Station, 754 F.2d 1251, 1256 (5th Cir., 1985). The Shelton case, supra, noted the 14th Amendment due process rights apply and recognize the right of the owner of a property interest to use his property in a lawful purpose, and cannot be arbitrarily and discriminatorily restricted by government zoning action; Id. at 1256-1257.

In this case, the City has not uniformly applied its standards for the granting of a setback variance. The City arbitrarily denied petitioner his application for a variance while granting the exact same request to another on a lesser showing. Further, the undisputed evidence established petitioner was the subject of discrimination in the denial of his application.

A variance is the authorization for

the maintenance of a building or structure which is prohibited by a zoning regulation. 82 Am.Jur.2D, Zoning & Planning Section 255. The purpose of a variance is to provide flexibility to zoning regulations, and to relieve unnecessary hardships or practical difficulties, which would result from strict enforcement of the law. Id. at section 266.

Petitioner is alleged to have violated the setback requirement of Saratoga City Code which provides that the minimum side yard shall be twenty feet. The setback is an area of space required between homes in a particular zoning area. Petitioner's balconies were found to have infringed upon the setback by three or four feet. (Ct. 48; 269: 20-22.) Petitioner sought a variance which would permit his balconies to encroach upon the setback.

Property within Mr. Renna's immediate neighborhood, known as the Nederveld property,[2] received variance approval to construct a second story balcony encroaching 10 feet into the lot's setback. (Ct. 11:21-23; 139-143.) The variance was granted within one month of the denial of a similar variance to petitioner. In its findings for the Nederveld variance, the physical hardship shown was that the balconies were of "minimal bulk and size" and "unnecessary practical difficulties" would result by enforcing the restriction. (Ct. 140.) The balcony area which is the subject of the Nederveld variance was 120 square feet (Ct. 139). In contrast, petitioner's balconies only protruded 3 or 4 feet, not 10 feet, into the setback. (Ct. 51.) Also, petitioner's balconies were only 63 square feet, the Nederveld's balconies were twice as large. (Ct. 51.)

In the Nederveld application, the Planning Commission found unnecessary practical difficulties, and exceptional or extraordinary circumstances, because the balconies were needed to provide "convenient and quick access to both rear yard areas" and "reasonable access from the kitchen to the yard". (Ct. 140.) Mr. Renna showed that his balconies were needed for the important purpose of fire escapes, were recommended by his architect, and could not be built elsewhere. Also, the home was located at the bottom of a valley minimizing any privacy impact, further diminished by high fences

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[2]The Nederveld property was a home a few blocks away from Mr. Renna's home. It received a variance for its balconies a month before the hearing on Mr. Renna's application.

and foliage to be constructed by his neighbor.

The Planning Commission also found it a common privilege to have reasonable access to the kitchen and no special privilege would be given by the granting of a variance for a balcony encroaching into a setback. (Ct. 140.) Petitioner showed that a balcony itself was a common privilege and enjoyed by more than half of his neighbors. Furthermore, insofar as no special privilege was found for the granting of such a variance for the Nedervelds, no special privilege could possibly be found for the granting of a similar variance for a less intrusive structure to Mr. Renna. Additionally, numerous other setback variances had been granted to many others for structures such as garages which encroached substantially more on the setback requirement.

Furthermore, it is undisputed that

the granting of petitioner's variance would not be detrimental to the public health, safety, or welfare. (Ct. 51.) Also, five of petitioner's surrounding neighbors wrote letters to the City supporting the retention of the balconies. (Ct. 154-159.)

Denial of petitioner's request for a variance, while routinely granting similar variances and specifically granting the exact same request on a lesser showing to a neighbor, established the City's action was arbitrary.

Additionally, the evidence showed the City acted capriciously in purposefully discriminating against petitioner. The City Council held its hearing on Mr. Renna's application for a variance at 12:37 A.M. on a weekday night. (Ct. 14: 1-2; 169.) Also, City Inspectors never indicated the balconies violated the setback requirements despite numerous

inspections of the property, until nearly one year after they were installed. (Ct. 13: 16-25; 125.) Suspiciously, the balconies became subject of the City's scrutiny only after petitioner previously appealed the City Planning Commission's decision concerning another aspect of his home. (Id.)

At the City's midnight hearing, the City Council revealed their hostility to petitioner. The record reflects that the city Council not only denied petitioner a variance for his balconies, but discussed stripping Mr. Renna of approval previously granted for a second story addition. (Ct. 113, 114.)

The trial court did not consider whether denial of petitioner's request for a variance was discriminatory. The trial judge concluded, "I may agree with Mr. Renna that he's being had, but that's not the issue." (Rt. 11: 6-7.) The 6th

District Court of Appeal similarly held that judicial review of the City's decision, "does not include judicial inquiry as to any discriminatory motive by the administrative body." (Opin. 12.) However, it is the very function of a court to review whether one has been denied due process or equal protection.

In the similar case of Shelton v. City College Station, 754 F2d 1251 (5th Cir. 1985) the Court of Appeal held the denial of a zoning variance, where similar requests of neighbors and other business properties in the area were granted, was arbitrary and discriminatory, unconstitution action. Id. at 1254.

Review by this Court is necessary to determine whether as a matter of law petitioner was the subject of arbitrary and capricious action by the City of Saratoga. Also review by this Court is

necessary to set forth clear precedent that a city's denial of a variance must not be discriminatory, resulting in a denial of Due Process or Equal Protection.

II

REVIEW IS NECESSARY BY THIS COURT TO FURTHER PRECEDENT THAT THE CITY'S FAILURE TO MAKE SUFFICIENT FINDINGS IS A DENIAL OF DUE PROCESS

Supporting findings and reasoning are essential to judicial review of administrative action Morris v. Gressette, 432 U.S. 491 (1976). Due process requires that a decision maker should state reasons for the determination and evidentiary basis relied upon. Staton v. Mayes, 552 F2d 908 (1977) cert. denied, 434 U.S. 907. Due process requires such a written decision so that appellate bodies within the agency and reviewing courts are able to ascertain whether the decision is arbitrary and

capricious or supported by reasonable substantial and probative evidence on the record considered as a whole. Jarecha v. INS, 417 F.2d 220 (1969).

The City Planning commission and council made no findings in denying petitioner's request for a variance. The City Planner did prepare a preliminary report which was later revised (Ct. 48; 58). Even these were never adopted by the City Planning Commission in its decision to deny the variance. (Ct. 96) Significantly, the Planning Commission in its resolution denying Mr. Renna a variance, crossed-out the language that it would be resolved "the Report of Finding [of the City Planner] attached hereto be approved and adopted," (Ct. 96). The Planning Commission's resolution resolved only that the "variance be denied" without any findings. (Id.) In contrast, the Planning Commission in

approving the variance for the Nederveld property did resolve that the Staff Report "attached hereto be approved and adopted" (Ct: 143). Additionally, the Staff Report for the Nederveld variance application was stamped "Approved by: CPC" [City Planning Commission], (Ct: 139) but no such approval was stamped upon the Staff Report for Mr. Renna's variance application.

The City of Saratoga also failed to make any written findings, but only resolved, "the City Council was unable to make the findings required by law for the granting of a variance or the findings required for design review approval". (Ct. 167) The City ambiguously stated in its resolution, the Council concurred with the conclusions of the Staff Report. It did not incorporate or adopt the City Planner's findings, but only agreed with the Staff Report that the variance should

be denied.

Similarly, it was held that county commissioner's denial of an application for rezoning of property without a statement of reasons was invalid for failure to adhere to concepts of minimal due process. South Gwinnett Venture v. Pruitt, 482 F.2d 389 (1973), rehearing granted 487 P.2d 1333, rehearing 491 F.2d 5, cert. denied 416 U.S. 901, cert. denied 419 U.S. 837.

Nevertheless, the trial found that the City had made findings. The 6th District Court of Appeal held that the City Planner's report had been adopted by the Planning Commission and City Council.

Even assuming the City had adopted the findings of this preliminary investigation, such findings violate due process. There are no findings as to the evidence submitted by petitioner to the City Council or Planning Commission.

These preliminary findings were made before the hearing where petitioner presented his evidence. There are no findings for example, as to whether the balconies enhanced fire safety, whether the immediately adjacent neighbors approved of the balconies, or whether the balconies enhanced the aesthetics of the property. If the Staff Report was the findings of the City, then it appears the evidence presented on behalf of petitioner was ignored and the public hearings valueless, as the report was prepared prior to the hearings on petitioner's evidence.

In the City Attorney's own words, a staff report does not reveal upon what basis the City makes its decisions to grant or deny a variance. In criticizing the use of the Nederveld Staff Report to establish the city's reasoning underlining a variance decision, the City

attorney stated:

> "You have Exhibit P ... which only gives you the staff report presented to the planning commission on Nedervelt. The transcripts of the planning commission, the people who spoke to the planning commission, the discussions among the commissioners, themselves, minutes of the meeting, formal action; you have none of that ... you must have an administrative record on Nedervelt so you can see the basis on which the planning commission made its findings, or did not." (Rt. 11: 19-24; 12: 3-5) (Emphasis added.)

The City Attorney recognized that the Nederveld Staff Report does not provide findings sufficient to enable the parties to determine whether, and on what basis, they should seek review. Similarly, the staff report on petitioner's request for a variance does not provide the findings required by due process.

Review by this court is necessary to determine if the City's findings, if any, satisfy due process.

III

REVIEW BY THIS COURT IS NECESSARY TO FURTHER PRECEDENT THAT A MIDNIGHT CITY HEARING WHERE COUNCILPERSONS ARE INATTENTIVE AND LEAVE IN THE MIDDLE OF A QUASI-JUDICIAL PROCEEDING IS A DENIAL OF DUE PROCESS

A fair trial in a fair tribunal is a basic requirement of due process. Re Murchison, 349 U.S. 133 (1955), Holt v. Virginia, 381 U.S. 131 (1965). The opportunity to be heard, required by due process, must be at a meaningful time and in a meaningful manner. Barry v. Barchi, 443 U. S. 55 (1979). The very notion of a hearing, under the due process clause of the fourteenth amendment, however informal, connotes that the decision maker will listen to any arguments of both sides before basing decision on evidence and legal rules adduced at the hearing. Billington v. Underwood, 613 F.2d 91 (1980).

Petitioner's hearing before the City

Council was held after 12:37 A.M. on a weekday night. (Ct. 14: 1-2; 169) Some councilmen were not present during the taking of evidence in the latter part of the quasi-judicial proceeding. (Ct. 115.) Other councilmen's attentiveness was diminished. One City Councilperson remarked, "Did you notice we are losing the council one by one. Must be time for a break." (Ct. 109.) It was later remarked by a Councilperson that this "proceeding was held at an awful hour of the night." (Ct. 113.) No one can deny that the absence of a judge during trial denies a party due process. Similarly, the absence of the councilpersons in this midnight quasi-judicial hearing denied petitioner due process.

Therefore review by this court is necessary to determine as a matter of law and to set precedent that petitioner was denied due process.

CONCLUSION

For the reasons herein advanced, and on the authority cited, petitioner respectfully urges that writ of certiorari be granted to hear and determine whether petitioner was denied due process and equal protection under the fourteenth amendment. Specifically, the Court must determine that petitioner was denied due process and equal protection in the denial of his application for a variance, while similar variances were granted upon a lesser showing. The Court must also determine as a matter of law that petitioner was denied due process in the failure of the city to give sufficient reasons for its determination in denying a variance. Finally, the Court must determine that as a matter of law, a midnight hearing with quasi-judicial judges periodically absent was a denial of due process.

Dated: October 7, 1986.

Respectfully submitted,

ADLESON, HESS, CHRISTENSEN

& KELLY

BY: Randy M. Hess

Randy M. Hess

APPENDIX

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

RALPH R. RENNA, Petitioner vs. CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA PLANNING COMMISSION, Respondent	No. 550575 STATEMENT OF DECISION C.C.P. Sec.632

The Petition for Writ of Mandamus and Alternate Writ of Mandate came on regularly for hearing on July 25, 1984, in Department 8 of the above entitled

Court before the Honorable Peter G. Stone, Judge of the Superior Court. Randy M. Hess appeared as counsel for Petitioner, RALPH R. RENNA, and Harold S. Toppel and Paul B. Smith, Saratoga City Attorneys, appeared as counsel for Respondents, the CITY COUNCIL and the PLANNING COMMISSION OF THE CITY OF SARATOGA.

Oral and documentary evidence having been presented by the parties and the cause having been argued and submitted, the Court hereby issues the following Statement of Decision:

1. With regard to the issue of whether Petitioner was entitled to issuance of a Writ of Mandate as set forth in the Petition for Writ of Mandate, the Court's decision is that Petitioner's

request is denied.

(a) The Court based its decision on the following facts:

(1) Petitioner is the owner of certain real property located at 15041 Sobey Road, Saratoga, California.

(2) In October, 1981, Petitioner received design review approval from the City of Saratoga to construct a single family residence upon said property having a size of approximately 5,630 square feet. A building permit authorizing the construction of such residence was thereafter issued by the City.

(3) The plans and specifica-

tions for the residence, as approved by the City in connection with the design review and building permit applications, did not show any balconies at the sides of the structure.

(4) During the course of construction, Petitioner made numerous modifications to the approved plans, including an increase in the size of the residence from 5,630 square feet to 8,652 square feet, and including also the addition of a balcony on both sides of the structure.

(5) The modifications to the approved plans, including the addition of the balconies, were

made by Petitioner without a building permit or prior design review approval, as required under the ordinances of the City of Saratoga.

(6) The balconies as constructed by Petitioner do not comply with the side yard setback requirements contained in the City's zoning regulations.

(7) The balconies were not approved by the City of Saratoga, at any time after the same were constructed by Petitioner.

(8) Petitioner's property complies with the minimum size and the width and depth

requirements for the zoning district in which it is located. The property has no unusual features with respect to size or topography which distinguish such property from other lots within the same zoning district and area.

(9) There is sufficient room upon the site for the construction of a balcony at the front or the rear of Petitioner's residence without violating the setback regulations of the City of Saratoga. Consequently, Petitioner has not been deprived of the opportunity of having a balcony.

(10) The proceedings before the

Saratoga Planning Commission and the Saratoga City Council on Petitioner's application for a variance were properly conducted as required by local ordinance and State law. During the course of such proceedings, Petitioner and other interested persons were given a full opportunity to be heard.

(b) The legal basis for the Court's decision is as follows:

(1) Petitioner had no vested right to keep and maintain the balconies.

(2) The City of Saratoga did not waive the right to enforce its zoning ordinance with

respect to the balconies and was not otherwise estopped from doing so.

(3) A denial of the variance will not cause hardship unique to Petitioner and of a kind which distinguishes Petitioner from other persons owning property within the same zoning district. The necessity to remove the existing balconies does not constitute hardship since the balconies were illegally constructed. Any hardship claimed by Petitioner is therefore self-induced.

(4) The granting of a variance for the balconies would confer a special privilege upon Peti-

tioner since there are no exceptional or extraordinary circumstances to allow an encroachment of the same into the setback areas required under the City's zoning ordinance.

(5) Petitioner failed to satisfy all of the standards required by law for the granting of a variance.

(6) The findings of the Saratoga Planning Commission and the Saratoga City Council were supported by substantial evidence.

(7) The decisions of the Saratoga Planning commission and the Saratoga City Council were

supported by the findings.

2. With regard to the issue of whether the City of Saratoga abused its discretion in denying Petitioner's application for a variance, the Court's decision is that the denial was not an abuse of discretion.

(a) The Court based its decision on the facts set forth in Paragraph 1(a) above.

(b) The legal basis for the Court's decision is that the decisions of the Saratoga Planning Commission and City Council were supported by findings and such findings were supported by substantial evidence.

3. With regard to the issue of whether Petitioner presented a proper basis of relief as set forth in Paragraph

Number 6, Page 6 of the petition, the Court's decision is that Petitioner has failed to do so.

(a) The Court based its decision on the facts set forth in Paragraph 1(a) above.

(b) The legal basis for the Court's decision is as set forth in Paragraph 1(b) above.

4. With regard to the issue of whether the city of Saratoga acted arbitrarily and capriciously so as to entitle Petitioner to attorney's fees as set forth in Paragraph 9 of the petition, the Court's decision is that the City did not act in an arbitrary or capricious manner in denying Petitioner's request for a variance.

(a) The Court based its decision on

the facts set forth in Paragraph 1(a) above.

(b) The legal basis for the Court's decision is as set forth in Paragraph 1(b) above.

5. with regard to the issue of whether the Respondents' decisions were supported by findings, the Court's decision is that the denial of the variance was adequately supported by the findings made by the Saratoga Planning commission and the Saratoga City Council.

(a) The Court based its decision on the facts set forth in Paragraph 1(a) above and the following additional facts:

(1) The Planning Commission adopted the findings set forth in the staff report dated December 29, 1983, a copy of

which is attached to the petition as Exhibit "E".

(2) Such findings were also adopted by the City Council in Resolution No. 2128, confirming its decision on the appeal, a copy of which is attached to the petition as Exhibit "K".

(b) The legal basis for the Court's decision is that a denial of the variance was consistent with and supported by the findings of the Planning Commission and the City Council that Petitioner had failed to satisfy all of the standards required by law for issuance of a variance, and in particular, that Petitioner had failed to demonstrate:

(1) Exceptional or extraordinary circumstances;

(2) Unnecessary physical hardship;

(3) Denial of a common privilege; and

(4) Absence of special privilege.

6. With regard to the issue of whether Respondents' decisions were supported by substantial evidence, the Court's decision is that the findings made by the Planning Commission and the City Council were supported by substantial evidence.

(a) The Court based its decision on the facts set forth in Paragraph 1(a) above, together with the administrative record of the proceedings conducted by the Planning Commission and the City Council submitted to the Court as part of

the petition.

(b) The legal basis for the Court's decision is that the reviewing court must resolve all reasonable doubts in favor of the administrative findings and decision, and in the present case, Petitioner has failed to demonstrate that all of the standards required by law for issuance of a variance have been satisfied.

7. With regard to the issue of whether the Court exercised its independent judicial review in rendering a decision on the Petition for Writ of Mandate, the Court's decision is that the "independent judgment" standard of review does not apply to this case.

(a) The Court based its decision on the facts set forth in Paragraph 1(a) above.

(b) The legal basis for the court's decision is that independent judicial review is applied only in cases where an administrative decision substantially affects a fundamental vested right, and the granting or denial of a variance does not constitute such a vested right. Petitioner did not acquire a vested right by reason of the balconies having been constructed since the construction was performed illegally, without a building permit and other approvals required under the Saratoga zoning ordinance.

Judgment is hereby ordered to be entered in favor of Respondents in accordance with the Order issued by this Court on August 31, 1984, as follows:

1. The Alternative Writ of Mandate is discharged.

2. The Preemptory Writ of Mandate is denied.

3. The Petition for Writ of Mandate is dismissed.

Dated: Mar 5 1985

_____

PETER G. STONE
Judge of the Superior Court

COURT OF APPEAL OF THE STATE OF CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

RALPH R. RENNA	)	No. H000311
Plaintiff and Appellant	)	
	)	Superior Court
vs.	)	No. 550575
	)	
CITY COUNSEL, CITY OF	)	
SARATOGA, et al.,	)	
Defendant and Respondent.	)	

BY THE COURT

The petition for rehearing is denied.

Dated May 15 1986

AGLIANO, P.J. P.J.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

RALPH R. RENNA,

Plaintiff and Appellant,

vs.

CITY COUNCIL OF THE CITY OF SARATOGA, et al,

Defendants and Respondents.

H000311

(Santa Clara County Super.Ct. No 550575)

Ralph Renna (petitioner) appeals from the trial court's denial of a writ of mandate which would have compelled the City of Saratoga to grant a variance for balconies constructed on petitioner's residence. After considering petitioner's contentions, we find no error and affirm the judgment.

Petitioner owns a single-family

dwelling in the City of Saratoga, California. In Octobe 1981 he received design review approval and a building permit from the City to build a 5,630 square foot single-story residence and a 980 square foot single-story accessory structure. In July 1983 petitioner began constructing second-story additions to both structures including balconies on the north and south walls of the residence. Petitioner constructed the additions without obtaining the required design review approval and building permits. The additions increased the total area of the residence and the accessory structure from 6,604 square feet to 8,652 square feet. Under the City's zoning ordinance the maximum total square footage for a residence and acces-

sory structures is 6,200 square feet.

The side yard setback requirement for petitioner's lot is 20 feet. The balcony on the north side encroaches three feet into the required side yard setbacks while the balcony on the south side encroaches four feet. When the City discovered the illegal modifications to the residence and its accessory structure, it informed petitioner he was required to seek design review approval. In applying for this approval, petitioner submitted drawings which revealed that the balconies violated the setback requirements. At that time the City advised petitioner that a variance for the balconies was required and he accordingly submitted an application.

The Saratoga Planning Commission

held public hearings to consider the application. On January 27, 1984, after reviewing the evidence, the Planning Commission voted four to zero to deny the variance application. Petitioner then appealed the Planning Commission's denial to the City Council. On March 7, 1984, the City Council also held a public hearing. After reviewing the evidence, the City Council voted five to zero to deny the appeal.

On June 5, 1984, petitioner filed a petition for writ of mandate seeking an order compelling respondents to grant a variance for the balconies. On July 25, 1984, the trial court conducted a hearing on the matter and subsequently entered judgment dismissing the petition.

Code of Civil Procedure section

1094.5, subdivision (c), sets forth the standard governing judicial review of a decision made by a local administrative agency. (Bixby v. Pierno (1971) 4 Cal.3d 130, 137.) It provides that an "abuse of discretion," one of the grounds upon which a writ of mandamus may be issued, "is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." The standard outlined in this section applies to the review of variances granted or denied by local zoning agencies. (Topanga Assn. for Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514.) Further, section 1094.5 contemplates that a reviewing court will examine the entire administrative record to determine if

that agency's decision is supported by substantial evidence. In making such a determination the court must resolve reasonable doubts in favor of the agency's findings and decision. (Ibid.) The appellate court's function is identical to that of the trial court. (Patterson v. Central Coast Regional Com. (1976) 58 Cal.App.3d 833, 842.)

The City Code sets forth the procedure for an applicant seeking a variance from a zoning regulation. the burden is placed on the applicant to submit evidence of "the precise nature of the variance requested and the practical difficult or unnecessary physical hardship inconsistent with the objectives of the zoning ordinance which would result from a strict or literal interpretation

and enforcement of a specified regulation of this ordinance, together with any other data pertinent to the findings prerequisite to the granting of a variance, prescribed in section 17.6." (Saratoga Zoning Ordinance Sec. 27.3.) The City zoning administrator makes an investigation of the application and prepares a report which is submitted to the Planning Commission. (Saratoga Zoning Ordinance, Sec. 17.5.) The Planning Commission conducts a public hearing at which time it reviews the pertinent evidence concerning the variance. (Saratoga Zoning Ordinance, Sec. 17.4.) the planning Commission may grant a variance if the planning Commission can make the following findings:

"(1) That strict or literal interpretation and enforcement of the specified regulation would result in practical

difficulty or unnecessary physical hardship inconsistent with the objectives of the zoning ordinance.

"(2) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property which do not apply generally to other properties classified in the same zoning district.

"(3) That strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by the owners of other properties classified in the same zoning district.

"(4) That the granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same zoning district.

"(5) That the granting of the variance will not be detrimental to the public health, safety or welfare, or materially injurious to properties or improvements in the vicinity." (Saratoga Zoning Ordinance, Sec. 17.6, subd. (a).)

In the instant case, the Planning Commission considered the evidence presented by petitioner, the city staff, and other concerned individuals. The Plan-

ning Commission concluded that petitioner did not offer sufficient evidence to meet the requirements of the zoning ordinance. To support its decision, the Planning Commission referred to the evidence presented in the staff report dated December 29, 2983. That report states as follows:

"1. Strict Interpretation/Physical Hardship

The objective of setback requirements in the R-1 Zoning Ordinance is to insure privacy and appropriate open space in each zoning district. Because the residence extends across the full width of the lot and the balconies would reduce both sideyard setbacks, the reduced setbacks would not be consistent with the Zoning Ordinance objectives of maintaining open space and privacy. Additionally, there is no practical difficulty which would result from not having balconies. Staff cannot make this finding.

"2. Exceptional Circumstance There is nothing extraordinary about the topography, vegetation or use of this property which would differentiate it from other residential properties in the R-1-40,000 zone. The shape of the subject property is unusual, however the lot width in the building area is 150 ft.,

which is the minimum width standard and is similar to many other properties in the zone. Staff cannot make this finding.

"3. Common Privilege Many residences in the zone do have 2nd story balconies or decks. The strict interpretation of the sideyard setback requirement does not deprive the applicant of the privilege to have 2nd story balconies, which could be constructed on the rear elevation or even the front elevation, where there would not be a setback violation. Staff cannot make this finding.

"4. Special Privilege Because there are no exceptional circumstances concerning the subject property or denial of a common privilege, the granting of this Variance would constitute a grant of special privilege. Staff cannot make this finding.

"5. Public Health, Safety and Welfare The granting of this Variance will not be detrimental to the Public Health, Safety or Welfare."

Thus, petitioner did not meet four of the five requirements.

After petitioner appealed the decision to the City Council, the Council

also concluded he had not met his burden and concurred with the findings of the staff report dated December 29, 1983. Thus, the administrative record contains substantial evidence to support the decision to deny the variance.

Petitioner, however, contends he presented sufficient evidence to support the findings required under section 17.6, subdivision (a). He argues that due to the design of the house it was impractical for him to construct the balconies anywhere but on the north and south walls of the house. Self-induced hardship affords no ground for granting a variance. (Town of Atherton v. Templeton (1961)198 Cal.App.2d 146, 154.) Here petitioner constructed the second-story addition, including the balconies, with-

out first obtaining the required design review approval and building permits. Had he complied with the city's requirement to submit plans, he would have been informed of the setback restriction and would then have had the opportunity to redesign the addition to allow for balconies which met the requirement. By choosing to construct an illegal addition to his residence, petitioner himself created the practical difficulty. Thus, any such difficulty may not be now used as a ground for obtaining a variance.

Petitioner also argues he would suffer physical hardship without the balconies because they were necessary to allow occupants to escape from the residence in the event of fire. He relies on hearsay evidence that a fire marshal

recommended the balconies for this purpose. The Planning Commission requested the fire marshal's recommendation be substantiated in writing. No such recommendation was ever submitted. Accordingly, the Planning Commission could properly conclude such evidence was insufficient to meet the first element of section 17.6.

Since petitioner has not met his burden on the first requirement for granting a variance under section 17.6, whether sufficient evidence was presented on the other requirements is irrelevant and we need not consider his remaining arguments.

Petitioner next contends the Planning Commission and the City Council failed to make sufficient findings to

permit adequate review. In Topanga Assn. For a Scenic Community v. Los Angeles, supra, 11 Cal.3d 506, 514, the court held an administrative agency must make findings sufficient to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to inform a reviewing court of the basis for the agency's action. However, these findings need not be as precise as those required of a court. "[R]eference to portions of a report in administrative findings incorporates that part of said report in the findings .... Other examples of the judiciary's willingness to focus on the substance rather than the form of administrative actions are legion. [Fn. omitted.] 'As a practical matter, omissions in [administrative]

findings may sometimes be filled by such relevant references as are available.' [Citations.] Thus, where reference to the administrative record informs the parties and reviewing courts of the theory upon which an agency has arrived at its ultimate finding and decision it has long been recognized that the decision should be upheld if the agency 'in truth found those facts which as a matter of law are essential to sustain its ... [decision].'" (McMillan v. American Gen. Fin. Corp. (1976) 60 Cal.App.3d 175, 183-184.)

Here the resolution of the Planning Commission discloses the application for the variance was denied "[p]er the Staff Report dated December 29, 198[3]" and that the Commission "could not make all of the requisite findings" under section

17.6, subdivision (a). thus, the Commission adopted the staff report findings on the issue of whether the elements of section 27.6, subdivision (a), had been met. The staff report outlines the evidence for each of the five elements for granting a variance and states why four of them were not met. The resolution of the city Council also adopted these findings. It stated "the Council concurred with the conclusions pertaining to said balconies as set forth in the Staff Report to the Planning Commission dated December 29, 1983." The City Council also concluded it "was unable to make the findings required by law for the granting of a variance." Such findings by incorporation by reference are permissible under the standard outlined in

McMillan v. American Gen. Fin. Corp., supra, 60 Cal.App.3d 175. The parties and the reviewing courts were adequately informed of the theory upon which the Planning Commission and the City Council based its decision.

Petitioner also contends the balconies are exempt from the setback requirement under zoning ordinance section 14.7. Section 14.7 provides in relevant part: "Open, unenclosed, uncovered balconies, porches, platforms, stairways, and landing places, no part of which is more than four feet above the surface of the ground, may extend into a required yard or space between buildings not more than four feet. Open, unenclosed, uncovered, metal fire escapes may project into any required yard or space

between buildings not more than three feet." (Emphasis added.) Section 14.7 is clearly inapplicable to the present case, because petitioner's balconies are approximately ten feet above the surface of the ground. Further, while the north balcony does not extend more than three feet into the required space, its lack of safe access to the ground belies its nature as a fire escape.

Petitioner next argues that the trial court committed reversible error by not considering his neighbors' support for the granting of a variance.

In Minney v. City of Azusa (1958) 164 Cal.App.2d 12, 34-35, the court stated "[w]hile objections of property owners cannot control the decision [of whether to grant a variance] they are not

to be disregarded." In the case before us, petitioner submitted letters from five neighbors in support of his application to the Planning Commission and the City Council. To support his contention the trial court gave no consideration to this evidence, he points to the court's comment, "[a]m I in the business of counting people for and against in the community? ... I don't count heads. Maybe the Council counts head[s], but the Court can't do that." However, the court's statements were made in the context of its limited role of review in these circumstances. There is nothing in the record indicating that the court disregarded the evidence presented by petitioner's neighbors.

Petitioner contends the trial court

committed reversible error by not considering whether he had received a fair hearing on his application for a variance.

Code of Civil Procedure section 1094.5, subdivision (b), provides in pertinent part: "The inquiry in such a case [the review of administrative decisions] shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." In its statement of decision, the trial court found that "[t]he proceedings before the Saratoga Planning Commission and the Saratoga City Council on Petitioner's application for a variance were properly conducted as

required by local ordinance and State law. During the course of such proceedings, Petitioner and other interested persons were given a full opportunity to be heard." Such a finding meets the requirements of section 1094.5.

Having ignored this finding, petitioner argues he was prejudiced because his hearing before the City Council was held at 12:37 a.m. He claims the attentiveness of the Council members was diminished and he "may" have been deprived of having witnesses in support of his variance speak. At the time of the hearing, petitioner did not raise any objection as to the late hour nor did he request a continuance. There is nothing in the record disclosing that Council members were not adequately informed of

the issues presented at the hearing or that petitioner knew of anyone who was unable to attend the hearing due to its late hour. There is no evidence that petitioner was denied a fair hearing.

Petitioner further claims the City discriminated against him in denying his application for a variance. However, section 1094.5, subdivision (b), does not include judiciary inquiry as to any discriminatory motive by the administrative body. Nor is there any evidence of improper discrimination.

The judgment is affirmed.

Agliano, P.J.

WE CONCUR:

_____

Brauer, J.

_____

Chang, J.*

Renna v. City Council of Saratoga, et al.
H000311

_____

*Assigned by the Chairperson of the Judicial Council.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H000311

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

RENNA

v.

CITY COUNCIL OF THE CITY OF SARATOGA, et al

Appellant's petition for review DENIED.

Bird
Chief Justice

PROOF OF SERVICE AND DECLARATION OF MAILING

(1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I am a citizen of the United States and a resident of the county aforesaid and am a member of the Bar of this Court; I am over the age of eighteen years and not a party to the within-entitled action; my business address is 110 North Third Street, San Jose, California 95112.

On October 9, 1986, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

The Clerk of the Supreme Court of the United States
1 First Street Northeast
Washington D.C. 20543

Harold Toppel
Paul Smith,
Attorneys for the City of Saratoga
P. O. Box 279
Mountain View, California 94942

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 9, 1986, at San

Jose, California.

RANDY M. HESS

State of California
County of Santa Clara

On October 9, 1986, before me the undersigned, a Notary Public for the State of California, personally appeared Randy M. Hess, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

DUANE WILLIAM SHEWAGA

OFFICIAL SEAL
DUANE WILLIAM SHEWAGA
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My comm. expires MAY 5, 1989

86-653

NO:

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1986

RALPH R. RENNA,

Petitioner and Appellant,

vs.

CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA PLANNING COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1986

RALPH R. RENNA,

Petitioner and Appellant,

vs.

CITY COUNCIL OF THE CITY OF SARATOGA, CITY OF SARATOGA PLANNING COMMISSION,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, City Council of the City of Saratoga and City of Saratoga

Planning Commission, oppose the Petition for Writ of Certiorari filed herein on the grounds that the decision for which review is sought does not raise questions of federal law that must be settled by this court.

STATEMENT OF THE CASE

1. FACTS

Petitioner, RALPH R. RENNA (hereinafter "RENNA"), is the owner of a single-family residence structure located at 15041 Sobey Road, Saratoga, California (hereinafter "RESIDENCE") (Clerk's Transcript on Appeal (hereinafter "C.T.") 6:8-12; 268:33-34). The RESIDENCE is located on a lot in a R-1-40,000 Zoning District on a level building area (C.T. 48; 58), and the topography, vegetation, use and size of the lot is similar to other properties in the Zoning District

and that immediate area (C.T. 51; 57; 61; 67; 269:22-26).

In October, 1981, RENNA received design review approval from the City of Saratoga (hereinafter "CITY") for a 5,630 square foot single-story residence and a 980 square foot single-story accessory structure (C.T. 48-49; 58-59; 268:35-269:3). In approximately July, 1983, RENNA proceeded to construct a second-story addition to the previously approved single-story residence and single story accessory structure, said additions including balconies on the north and south walls of the residence (C.T. 18:20-23; 269:8-12). The balconies were constructed solely for aesthetic reasons (C.T. 44, 112). The second-story additions (including the balconies) were constructed by RENNA without first obtaining the required design review approval and building permits for such

additions from the CITY (C.T. 49; 59; 269:13-16). The unapproved and illegal second-story additions increased the total floor area for the residence and accessory structures by approximately 31% from 6,604 square feet to 8,652 square feet (C.T. 48-49; 58-59; 269:8-12). The CITY'S Zoning Ordinance establishes a standard of 6,200 square feet as the total square footage for a residence and accessory structures which may be constructed on a lot within the R-1-40,000 zoning district (C.T. 49; 59).

The side yard setback requirement for RENNA'S R-1-40,000 zoned lot is 20 feet (C.T. 48; 58). The balconies constructed by RENNA without the required design review approval and building permits encroach into the required side yard setbacks, three (3) feet for the north side balcony and four (4) feet for the south side balcony (C.T. 48-49; 58-

59; 269:17-19). The encroachment of both of the balconies into the side yard setbacks require variance approval (C.T. 49; 59).

Upon discovery of the illegal modifications to his residence and accessory structures, the CITY informed RENNA that design review approval thereof was required. The CITY first became aware that the balconies violated the setbacks when drawings showing the second-story addition were submitted to the CITY by RENNA in 1983 in connection with his application for design review approval for the remainder of the illegal modifications (C.T. 41; 49; 59; 148-159). RENNA was advised by the CITY at that time that a variance would also be required to legitimize the balconies as they currently existed (C.T. 41). An application for a variance for the balconies to encroach into the side yard

setbacks was submitted by RENNA to the CITY, and noticed public hearings on both the design review and variance applications were held by the Saratoga Planning Commission (hereinafter "Planning Commission"), on January 11, 1984, and January 17, 1984, to consider said applications (C.T. 69-94).

On January 17, 1984, after reviewing the evidence and taking public testimony, the Planning Commission voted 4-0 to deny RENNA's balcony variance application as per the recommendations contained in the Staff Report dated December 29, 1983 (C.T. 70; 91; 96). That Staff Report set forth the findings that had to be made pursuant to Saratoga Zoning Ordinance Section 17.6(a) in order to grant a variance, and evaluated the facts of Renna's application as it applied to each of those mandatory findings (C.T. 61). The Planning Commission concluded that it

could not make all of the findings required by the Zoning Ordinance for the granting of the requested variance (C.T. 96). However, the Planning Commission did grant design review approval of the second story additions made by RENNA to his residence and accessory structure (C.T. 98).

RENNA appealed the Planning Commission variance denial to the Saratoga City Council (hereinafter "City Council") (C.T. 101). On March 7, 1984, that appeal was heard by the City Council at a de novo public hearing (C.T. 107; 109-124). After reviewing the evidence and taking public testimony, the City Council voted 5-0 to (1) deny the appeal and affirm the decision of the Planning Commission, and (2) resolve that it was unable to make the findings required by Saratoga Zoning Ordinance Section 17.6(a) for the granting of the variance and

concurred with the evaluation of the facts pertaining to said balconies as set forth in the Staff Report to the Planning Commission dated December 29, 1983 (C.T. 107; 123).

ARGUMENT

I.

THERE IS NO QUESTION OF LAW FOR THE UNITED STATES SUPREME COURT TO SETTLE IN THIS CASE REGARDING THE RESPONDENT'S ALLEGED ARBITRARY AND CAPRICIOUS DENIAL OF PETITIONER'S VARIANCE APPLICATION, NOR REGARDING THE PETITIONER'S ALLEGED DENIAL OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Petitioner requests this court's review of a state court judgment affirming the Respondents' decision to deny Petitioner's application for a zoning variance. Petitioner contends that the Respondents' denial was arbitrary and capricious because the City had previously granted other variances to other persons on other properties regarding other projects. Petitioner

also contends that the Respondents' denial of his variance application denied him equal protection and due process under the Fourteenth Amendment. However, Petitioner fails to recognize that this case was decided and affirmed in the state courts based upon established legal principles regarding judicial review of administrative decisions, due process, and equal protection, is supported by established federal legal principles, and does not raise any federal questions of law which require settlement by the United States Supreme Court. Therefore, it is respectfully submitted that this court need not exercise its discretion to grant writ of certiorari review of this issue.

The Petitioner contends that the Respondents' decision to deny his variance application was arbitrary and capricious because the Respondents did

not uniformly apply the City's standards for deciding variance applications. Petitioner alleges that the Respondents have granted other variances to other persons on other property for other purposes, including a variance for a balcony on another property (the Nederveld property) in December 1983, whereas the Respondents denied the variance for the balconies on the Petitioner's property in January and March of 1984. However, the administrative record, and the law, do not support those contentions.

The law is clear that each variance, by its very nature, is unique. Zakessian v. City of Sausalito (1972) 28 Cal. App. 3rd 794, 799-800. In passing on an application for a variance, action taken on other applications, or the existence of non-conforming uses in the vicinity, is not conclusive. 101A C.J.S., Zoning,

section 246, p. 270. Prior variances granted by a zoning adjustment board are not in themselves controlling as to subsequent variance applications for different properties. Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 32, appeal dismissed 359 U.S. 436. Otherwise, the granting of one variance from a particular zoning regulation would be asserted as a justification for all future requests for variances from the same zoning regulation, and thus, the general regulation eventually would be nullified, and the anullment of any zoning regulation is a legislative function that is beyond the domain of a zoning appeals board. Id.. In making its decision regarding the Petitioner's application, the Respondents reviewed both documentary evidence and oral testimony received at the public hearings regarding the application (C.T. 69-94;

107; 109-124). Based on that evidence, the Respondents determined that the Petitioner's application did not satisfy the five mandatory elements set forth in Saratoga Zoning Ordinance section 17.6(a) for the granting of a variance (C.T. 96; 107; 123).

The California courts, in reviewing the City Council's decision under a petition for writ of mandate filed pursuant to California Code of Civil Procedure Section 1094.5, were required to uphold the decision if they found that the decision was supported by findings, and the findings were supported by substantial evidence in light of the administrative record before the City Council when it made its decision. Siller v. Board of Supervisors (1962) 58 Cal. 2d 749. The reviewing state courts applied that standard and affirmed the City Council's decision. The fact that

other variances may have been granted by the Respondents to other persons for different purposes on different parcels of land is not the deciding factor. Based upon the evidence before it at its hearings, the Respondents decided that the Petitioner's application did not meet the mandatory requirements of Saratoga Zoning Ordinance section 17.6(a) for the granting of the requested variance, and on that basis, denied the application.

Under federal law, allegations of arbitrary and capricious zoning decisions are reviewed as part of substantive due process under the Fourteenth Amendement, and the substantive due process requirement is met if there is any conceivable rational basis for the zoning decision. Vance v. Bradley, 440 U.S. 93 (1978); Shelton v. City of College Station, 780 F.2d 475, 477 (5th Cir. 1986). A particular decision or action

is arbitrary if it is reached without an adequate determining principle or was unreasoned. Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983). The key inquiry is whether the question is at least debatable. If it is, there is no denial of substantive due process as a matter of federal constitutional law. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981).

The facts of Petitioner's application, as determined after public hearings and contained in the administrative record, did not satisfy the requisite elements necessary for the granting of a variance (C.T. 61). Therefore, the Respondents' decision to deny Petitioner's variance application was made on a rational basis and cannot be deemed arbitrary or capricious.

Petitioner's contention that the Respondents' denial of his application

for a zoning variance was discriminatory and denied him equal protection is also without merit. The fact that a City may have granted variances to some property owners and denied variances to other property owners in the immediate neighborhood or same zoning district does not establish unreasonable discrimination. City of San Marino v. Roman Catholic Archbishop of Los Angeles (1960) 180 Cal. App. 2d 657, cert. denied 364 U.S. 909. A claim of discriminatory enforcement of zoning regulations must involve an element of intentional or purposeful discrimination. Tarkowski v. Robert Bartlett Realty Company, 644 F.2d 1204, 1206 (7th Cir. 1980). A discriminatory purpose is not to be presumed, but rather there must be a showing of clear and intentional discrimination. Snowden v. Hughes, 321 U.S. 1, 8 (1944).

The record in the present case is devoid of any facts showing clear and intentional discrimination by the Respondents in denying Petitioner's variance application. Once again, the fact that other variances may have been granted to other persons for different projects on different properties is not the test. The City evaluates each variance application by the same criteria contained in Saratoga Zoning Ordinance section 17.6(a). The standard remains the same in each case. However, the facts of each case are unique.

Therefore, it is respectfully requested that this court refrain from exercising its discretion to grant the Petitioner's request for review by writ of certiorari because this case does not raise a question of law which must be settled by this court. To expand the availability of federal review to every

zoning decision would only serve to further congest an already overburdened federal court system. Scudder, supra, at 1003.

II.

THE CITY MADE SUFFICIENT FINDINGS IN SUPPORT OF ITS DECISION TO DENY PETITIONER'S VARIANCE APPLICATION AND THUS THIS COURT NEED NOT REVIEW THIS ISSUE.

The Petitioner contends that the Respondents made no findings regarding their decision to deny the Petitioner's variance application and, therefore, the Petitioner's due process rights have been violated. Petitioner's contention is factually wrong and does not raise a federal issue worthy of United States Supreme Court review.

The administrative record in this case states the findings on which the Respondents based their decision, namely, the failure of Petitoner's application to

satisfy the statutory requirements for the granting of a varaince (C.T. 107; 122-123). Those findings incorporate by reference the Planning Department Staff Report (C.T. 61). Findings for administrative decisions may incorporate by reference such reports. McMillan v. American General Finance Corp. (1976) 60 Cal. App. 3d 175.

This court has previously expressed its displeasure with the idea of federal due process claims being the basis for federal court adjudication when adequate remedies are provided by a state forum. Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Ingraham v. Wright, 430 U.S. 651 (1977).

California law guarantees a judicial review (based upon the substantial evidence standard of review) of any zoning regulation enforcement decision. California Code of Civil Procedure

Section 1094.5; Siller, supra. The standard of review established by California Code of Civil Procedure Section 1094.5 requires that an administrative adjudicative decision must be supported by findings, and the findings must be supported by the evidence. Plaintiff has availed himself of that form of judicial review, and the Respondents' decision denying the variance application has been considered and affirmed by the trial court (both after the original hearing and after a motion for reconsideration), the State Court of Appeal (both after the original appeal and after a petition for rehearing), and the California Supreme Court. Therefore, Petitioner's contention of no findings is tantamount to saying that the Respondents' decision is unsupported by substantial evidence. Where judicial review in state courts is

guaranteed by statute and where the substantial evidence standard of review is required, it would be inappropriate to proclaim a federal due process violation on grounds which are simply tantamount to saying that the particular decision is unsupported by substantial evidence. Moore v. Ross (D.C.N.Y. 1980) 502 F. Supp 543, affirmed 687 F.2d 604, cert. denied 459 U.S. 1115.

Inasmuch as the Petitioner has availed himself of an adequate remedy provided by California Code of Civil Procedure Section 1094.5 for ascertaining the sufficiency of the Respondents' findings, this federal claim disputing the adequacy of the findings does not warrant review by this court.

III.

PETITIONER'S ATTEMPT TO RAISE SPECULATIVE ALLEGATIONS OF PROCEDURAL DUE PROCESS VIOLATIONS FOR THE FIRST TIME IN THIS APPEAL DOES NOT WARRANT THIS COURT'S REVIEW BY WRIT OF CERTIORARI.

Petitioner contends that this court must review this case in order to determine that he was denied a fair hearing before the City Council in violation of his due process rights. The contentions alleged for this proposition are that the public hearing was held at a late hour, and that various council members were absent at the time the decision was made. Once again, Petitioner's factual allegations are not correct and these claims do not raise federal questions warranting review by this court.

All claims alleging violations of procedural due process must be raised at the adminsitrative hearing or they are barred. Valley Wood Preserving, Inc. v. Paul, 785 F.2d 751 (9th Cir. 1986). The Petitioner, who was represented by his attorney at the City Council public hearing, did not object at the public

hearing as to the hour of that hearing. If he felt that it was too late, he could have objected at that time and requested that the hearing be continued to a meeting at a future date and time. Petitioner did not object, nor did he request a continuance. Since Petitioner raised no procedural due process objection at the time of his hearing, and chose to proceed with his hearing, he is now barred from bringing any claims regarding alleged procedural due process violations.

Moreover, Petitioner's allegations regarding missing and inattentive councilmembers are inaccurate. The administrative record shows that all five councilmembers were present during the public hearing and voted on the Petitioner's appeal (C.T. 107, 109-124). Although Petitioner contends that the attention of the councilmembers present

at the hearing diminished, this claim is purely speculative "mind reading". Once again, if the Petitioner, who was represented by his attorney at the hearing, had a question regarding the attentiveness of the councilmembers hearing his appeal, he could have requested that the hearing be continued to a meeting at a future date and time. Petitioner's failure to so object at the time of his hearing now bars him from raising this speculative claim at this time.

The administrative record shows that the Petitioner was given an opportunity to be heard, and he availed himself of that opportunity without objection at the time his matter was called. The matter was heard as an ordinary administrative proceeding involving a de novo hearing regarding a variance request. An ordinary administrative proceeding

involving land use or zoning does not present serious due process or equal protection issues, no matter how disappointed the license or privilege seeker may feel at initially being turned down; Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1981), cert. denied 459 U.S. 989 (1982).

Petitioner's attempt to raise speculative allegations to the level of substantial procedural due process claims for the first time on appeal does not warrant this court's review by writ of certiorari.

CONCLUSION

For all of the aforementioned reasons, it is respectfully requested that this court deny the Writ of Certiorari review sought by Petitioner.

Dated: November 7, 1986

Respectfully submitted,

ATKINSON-FARASYN

BY: _____
Leonard J. Siegal

PROOF OF SERVICE AND DECLARATION OF MAILING

1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I am a citizen of the United States and a resident of the county aforesaid and am a member of the Bar of this Court; I am over the age of eighteen years and not a party to the within-entitled action; my business address is 660 West Dana Street, Mountain View, California 94042.

On November 7, 1986, I served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope by Express Mail, overnight delivery, postage thereon fully prepaid, in the United States mail at Mountain View, California, addressed as follows:

The Clerk of the Supreme Court of the United States
1 First Street Northeast
Washington D.C. 20543

By First Class Mail addressed as follows:

Randy M. Hess, Esq.
Duane W. Shewaga, Esq.
Robin L. Pearl, Esq.
Adleson, Hess, Christensen & Kelly
110 North Third Street
San Jose, CA 95112

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 7, 1986, at Mountain View, California.

Steven G. Baird

STEVEN G. BAIRD

State of California
County of Santa Clara

On November 7, 1986, before me the undersigned, a Notary Public for the State of California, personally appeared Steven G. Baird, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

Nancy L. Sugimoto

NANCY L. SUGIMOTO